Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ROSETTA HILLARY,
Petitioner,

versus

TRANS WORLD AIRLINES, INC.
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT,
UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether this Honorable Supreme Court should grant a writ of certiorari to review the Fifth Circuit Court of Appeals' departure from established opinions in other circuits which hold that the loss of a valid statute of limitations defense does not constitute a bar to a dismissal without prejudice.

PARTIES TO THE PROCEEDING

Rosetta Hillary

Trans World Airlines, Inc.

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DECISIONS BELOW

1. The December 2, 1991 Order of the United States District Court, Eastern District of Louisiana, Civil Action Number 92-3001, Hillary v. Trans World Airlines, Inc., granting motion for summary judgment filed on behalf of Trans World Airlines, Inc.

2. The United States Court of Appeals for the Fifth Circuit affirmed the lower court's decision which dismissed the claims of Rosetta Hillary, January 13, 1994.

JURISDICTION

Jurisdiction in this Court is founded upon 28 U.S.C. 17.1(a) and its discretionary authority pursuant to considerations governing review on Writ of Certiorari.

STATEMENT OF THE CASE

In March 1987, Rosetta Hillary (hereinafter referred to as "Hillary"), suffered injuries to her head and neck resulting from a Trans World Airlines, Inc. (hereinafter referred to as "TWA") employee striking her on the head with a personal computer as the employee attempted to remove it from an overhead bin. The accident occurred in St. Louis, Missouri as Mrs. Hillary was required to deplane and change to a connecting flight for travel from St. Louis to New Orleans.

Mrs. Hillary decided to pursue a claim for her injuries and obtained representation with an attorney in St. Louis. After approximately a year and a half, Mrs. Hillary became dissatisfied with counsel, as no suit had been filed and no action had been taken, and thereafter sought representation in her home state.

When Mrs. Hillary obtained counsel in Louisiana, the prescriptive period for her claim in that state had expired. Therefore, the only way to protect Mrs. Hillary's rights at that point and litigate the claim in Louisiana was to file suit in Louisiana and use the law of Missouri, where the statute of limitations was five years. In April 1991, Mrs. Hillary filed suit against TWA for her personal injuries in federal district court for the Eastern District of Louisiana, pursuant to diversity jurisdiction, asserting the applicability of Missouri prescriptive law.

TWA moved for summary judgment, asserting that Louisiana's one-year statute of limitations barred the claim under La. Civ. Code Ann. art. 3492 (West 1993). Because the court applies the law of the forum state to the issue of limitations in a diversity case, Mrs. Hillary moved for voluntary dismissal under Fed.Rules Civ.Proc.Rule 41(a)(2), 28 U.S.C.A. Mrs. Hillary then filed suit in federal court in Missouri in order to use

Missouri's five year statute of limitations. Mo. Ann. Stat. sec. 516.120 (Vernon 1991).

In December 1991, the Louisiana district court granted TWA's motion for summary judgment based on Louisiana's statute of limitations. The court denied Mrs. Hillary's motion for voluntary dismissal and it dismissed her claim with prejudice. The dismissal with prejudice thus barred Mrs. Hillary's claim in Missouri.

Mrs. Hillary then appealed to the Fifth Circuit Court of Appeals, asserting that a dismissal without prejudice should have been granted because the motion was not filed in bad faith and defendant would suffer no plain legal prejudice as a result.

On January 13, 1993, the Court of Appeals granted defendant's Motion for Summary Judgment, finding no abuse of discretion in the district court's denial of Mrs. Hillary's motion for voluntary dismissal without prejudice.

ARGUMENT

There is a limited case law addressing the issue of whether it constitutes an abuse of discretion for a district court to dismiss without prejudice an action that is time barred as brought, where the effect of such dismissal is to allow the plaintiff to refile the action in a place where the action is not time barred. In Phillips v. Illinois Cent. Gulf R.R., 874 F.2d 984, (5th Cir. 1989) and McCants v. Ford Motor Co. Inc., 781 F.2d 855 (11th Cir. 1986), the two leading cases reach different conclusions. This Court is called upon to resolve a conflict between the Fifth Circuit and the Eleventh Circuit on an issue developed on the facts below.

Rule 41(a)(2) provides that the court has sound discretion in allowing a plaintiff to dismiss an action voluntarily and without prejudice to future litigation at any time. Fed.Rules Civ.Proc.Rule 41(a)(2), 28 U.S.C.A. The purpose of the rule is to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions. Alamance Industries, Inc. v. Filene's, 291 F.2d 142, 146 (1st Cir.) cert. denied, 368 U.S. 831, 82 S.Ct. 53, 7 L.Ed 33 (1961). In most cases, a dismissal without prejudice should be granted unless the defendant will suffer clear legal prejudice, *other than the mere prospect of a subsequent lawsuit on the same set of facts*, as a result. LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 604 (5th Cir. 1976).

In upholding the district court's denial of Mrs. Hillary's motion for voluntary dismissal without prejudice, the Fifth Circuit completely disregarded well settled principles in this area. As a result, petitioner, acting in good faith, stands to suffer tremendous hardship because she will have lost her right to sue for the personal injuries she suffered at the hands of respondent.

While there are only a handful of cases on point, virtually every court that has addressed this issue has decided in favor of the party moving for dismissal without prejudice. Under circumstances similar to the case at bar, the court in Germain v. Semco Service Machinery Co., 79 F.R.D. 85 (E.D.N.Y. 1978) allowed movant to dismiss his time-barred action without prejudice, even though the plaintiff would then be able to refile the action in another jurisdiction with a longer statute of limitations. The court determined that the statute of limitations should not weigh heavily in its decision under Rule 41(a)(2) because the defendant acquired no vested right simply because plaintiff filed in the wrong forum.

Similarly, in Klar v. Firestone Tire & Rubber Co., 14 F.R.D. 176 (S.D.N.Y. 1953), the court allowed plaintiff to dismiss his action in New York without prejudice, where the prescriptive period had expired, so that he could refile in Ohio, which had a longer statute of limitations. The court expressed the view that because no intentional abuse was evident, the plaintiff should not be forced to suffer because of counsel's obviously inadvertent error.

Mrs. Hillary stands in a similar position. Due to the lethargic manner in which her claim was handled by Missouri counsel, Mrs. Hillary was compelled to seek Louisiana counsel. She did not know, nor could she have known, that the prescriptive period for filing her claim in Louisiana had expired. The Missouri attorney not only failed to file Mrs. Hillary's claim in Missouri within the year and a half she had the case, but also failed to advise Mrs. Hillary about Louisiana's prescriptive period for her claim. Because the Missouri attorney had not filed Hillary's claim in Missouri, Hillary's claim could have been filed in Louisiana within the statutory period. However, Mrs. Hillary was never told of this option.

The reasoning set forth in Klar is further supported in a decision by the former Fifth Circuit Court of Appeals in Durham v. Florida East Coast Ry. Co., 385 F.2d 366 (5th Cir. 1967). In that case, the court noted that there was no evidence of bad faith on behalf of plaintiff's counsel who failed to move to amend the complaint and advance the new claim in a timely manner. Furthermore, the Durham court observed that if a voluntary dismissal had been granted, the only prejudice the defendant would have suffered was the "annoyance of a second litigation upon the same subject matter." Id. Thus, the loss of a valid statute of limitations defense does not constitute a bar to a dismissal without prejudice.

More recently, these well established principles were reaffirmed by the Eleventh Circuit Court of Appeals in McCants v. Ford Motor Co., 781 F.2d 855 (11th Cir. 1986). Echoing the court's reasoning in Durham, the Eleventh Circuit held that the likelihood that a dismissal without prejudice will deny the defendant a statute of limitations defense does not constitute plain legal prejudice and should not alone preclude such a dismissal. The McCants court could not find that the defendant suffered any plain legal prejudice other than the prospect of a second lawsuit on the same set of facts.

Faced with this great weight of authority, the Fifth Circuit completely ignored the prevailing mandate of the other circuits in upholding the dismissal with prejudice in this case. The Fifth Circuit incorrectly relied on Phillips v. Illinois Cent. Gulf R.R., 874 F.2d 984 (5th Cir. 1989) in reaching its decision, a decision wholly inconsistent with prior case law addressing this matter.

The Phillips court made a sharp break from tradition when it misinterpreted the ruling in McCants, holding that the prospect of a second lawsuit on the same set of facts is sufficiently prejudicial to the defendant because the defendant would be stripped of an absolute defense to the suit- the difference between winning the case without a trial and trying the case without knowing the outcome of the proceeding.

The Fifth Circuit's conclusion in Phillips is flawed because it is both contrary to existing case law, and it distorts the purpose of Rule 41(a)(2). As previously stated, the rule is designed to protect the interests of the defendant. Yet prior case law has held that the defendant has no vested right that would be stripped if the plaintiff were allowed to, in good faith, voluntarily dismiss the claim time-barred in one state and refile in another. Germain, supra. The mere fact that the defendants are exposed to

another suit is not prejudice. New York Petroleum Corp. v. Ashland Oil, Inc., 757 F.2d 288, 295 (1985); *see also* United States v. E.I. Du Pont de Nemours & Co., 13 F.R.D. 490 (N.D. Ill. 1953).

Further support for this reasoning is found in Bolten v. General Motors Corp., 180 F.2d 379. There, the Seventh Circuit noted that the only pleadings filed by the defendant were its answer to the complaint and the motion for summary judgment based on the lapsed statute of limitations period. The adjudication on this issue had nothing to do with the merits of the case and only meant that the action could not proceed in that particular jurisdiction. And while the defendant may be subject to the annoyance and expense of a suit on the merits, it will not suffer any legal prejudice. In fact, TWA has been involved in the investigation and pursuance of this litigation since the date of the accident in 1987.

Mrs. Hillary was not engaged in egregious forum shopping or other such abusive practices when she filed her motion for dismissal. Rather, Ms. Hillary moved for dismissal so that she could pursue her case after counsel relied on Missouri's prescriptive period being used in a Louisiana federal court. Mrs. Hillary is being made to suffer great hardship due to the courts dismissal with prejudice. She in no way maneuvered the litigation to gain an advantage over respondent and should not be penalized as if she did. In every circuit except the Fifth Circuit, Mrs. Hillary would be granted a dismissal without prejudice. The Fifth Circuit is the only one to give such harsh and unyielding treatment to a plaintiff acting in good faith.

The Fifth Circuit, however, rejects the sound reasoning of previous decisions in favor of a draconian rule which penalizes plaintiffs who have acted in good faith. The effect of the Fifth Circuit's ruling is that innocent plaintiffs are prohibited access

to the courts. The merits of their cases are never reached due to a procedural error. The defendants then may simply assert an absolute defense that the statute of limitations bars the claim, thereby escaping liability on a mere technicality.

This rule serves to double the injury suffered by the plaintiff. The actual injury is compounded by the inability to obtain relief from the party at fault. The Fifth Circuit's approach crosses the line between protecting the rights of defendants and denying plaintiffs their day in court and should be flatly rejected.

CONCLUSION

As the prevailing jurisprudence indicates, judges should grant voluntary dismissals which allow a plaintiff to refile a claim in another jurisdiction where the suit is not time-barred without prejudicing the defendant. The cases cited above illustrate that the Fifth Circuit has steered its own path in holding that the loss of the affirmative defense of the statute of limitations represents clear legal prejudice, thereby denying the injured party the opportunity to litigate the case on the merits.

Most courts agree that the mere fact that the defendant is exposed to another suit does not constitute prejudice. The Fifth Circuit stands alone in rejecting this reasoning. In doing so, the Fifth Circuit denies plaintiffs who have acted in good faith the opportunity to obtain relief for the injuries they have suffered. This severe measure directly challenges the prevailing mandate followed by all other courts.

Mrs. Hillary is an innocent victim. She obtained counsel in Missouri thinking that having counsel in the state where the accident occurred would be the best course of action. She relied

on the skill and expertise of her Missouri attorney and all she received was inaction. Through no fault of her own, she is now being punished for her faith in the legal system. The rule in the Fifth Circuit stands as an example of stark inequity and should be abandoned.

Therefore, Mrs. Hillary respectfully requests that this Court grant this Writ and acknowledge the error of the Fifth Circuit and the District Court by reversing the grant of motion for dismissal with prejudice and allow her to refile her claim in another jurisdiction.

Respectfully Submitted,

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ATTORNEYS FOR PETITIONER
ROSETTA HILLARY

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3001
Summary Calendar

ROSETTA HILLARY,
Plaintiff-Appellant,
VERSUS
TRANS WORLD AIRLINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-91-1312-D)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

In issue is whether the district court abused its discretion denying plaintiff's motion for voluntary dismissal and, concomitantly, granting defendant summary judgement and thereby dismissing plaintiff's claim with prejudice, where a dismissal without prejudice would not only have exposed defendant to litigation in another forum, but also would have stripped defendant of an affirmative defense. Finding no reversible error, we AFFIRM.

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precendential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Rosetta Hillary was a passenger on a TWA flight from Los Angeles, California, to St. Louis, Missouri, in March 1987. Hillary alleges that as she prepared to deplane in St. Louis, a TWA employee was removing a personal computer from an overhead bin above her seat; the computer fell, injuring her. Over four years later, in April 1991, Hillary sued TWA in federal district court in Louisiana, pursuant to diversity jurisdiction.[2]

TWA moved for summary judgment, asserting that Louisiana's one-year statute of limitations barred the claim.[3] In response, Hillary contended that, notwithstanding her filing suit in Louisiana, the "only solution to [her] dilemma" was to attempt to use Missouri's five-year statute of limitations, instead of Louisiana's.[4] In the alternative, Hillary moved for voluntary dismissal, under Fed. R. Civ. P.41(a)(2), so that she could pursue her case in federal court in Missouri. At the same time, Hillary filed suit against TWA in federal district court in Missouri.

---

[2] TWA has since filed for bankruptcy; the Bankruptcy Court in Delaware modified the automatic stay to allow Hillary to proceed, pursuant to a stipulation from Hillary that she would enforce any judgment she obtained only against TWA's insurers.

[3] Although the Louisiana statute is not identified, we assume that it is La. Civ. Code Ann. art. 3492 (West 1993), which provides, in relevant part: "Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day inuury or damage is sustained..."

[4] Hillary conceded, however, that the district court in Louisiana had to apply Louisiana's statute of limitation, not Missouri's. In her memorandum in opposition to summary judgment, Hillary stated that she was "hardpressed [sic] to deny the correctness of defendant's position", i.e., that the statute of limitations entitled TWA to summary judgment. She also stated that she realized that the court would "customarily apply the law of the forum to the issue of limitations in a diversity case... plaintiff can not refute the fact that Louisiana's prescriptive period has expired."

In a judgment entered in December 1991, the Louisiana district court granted TWA's motion for summary judgment, based on Louisiana's statute of limitations, and denied Hillary's motion for voluntary dismissal without prejudice. Accordingly, it dismissed her claim with prejudice.

II.

Rule 41(a)(2) states in pertinent part that:

> an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper...Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

The district court's denial of a Rule 41(a)(2) motion is within its sound discretion; we review only for abuse of that discretion. *Phillips v. Illinois Cent. Gulf R.R.*, 874 F.2d 984, 986 (5th Cir. 1989). The only issue before us is such abuse of discretion vel non, concerning Hillary's motion being denied, with the result that her claim was dismissed with, rather than without, prejudice.

In denying Hillary's Rule 41(a)(2) motion, the district court cited *Phillips*, 874 F.2d 984. That case governs here, although Hillary urges us to follow the Eleventh Circuit's decision in *McCants v.Ford Motor Co.*, 781 F.2d 855 (11th Cir. 1986).

McCants held that, absent bad faith on the part of the movant or "plain legal prejudice" to the defendant, a motion to dismiss under Rule 41(a)(2) should be granted, and the case dismissed without prejudice. Id. at 858. The *McCants* court also stated that "the likelihood that a dismissal without prejudice will deny the defendant a statute of limitations defense does not

constitute plain legal prejudice and hence should not alone preclude such a dismissal."[5] *Id.*

In *Phillips*, however, this court discussed the quoted language from *McCants*, and reached a different result – the result that TWA urges – that the loss of a statute of limitations defense is plainly prejudicial to the defendant, making denial of the motion appropriate. *Phillips*, 874 F.2d at 987. *Phillips* stated:

> We agree that the mere prospect of a second lawsuit on the same facts is not sufficiently prejudicial to the defendant to justify denial of a Rule 41(a)(2) motion to dismiss. In this case, however, the facts in the second lawsuit would differ in that the defendant would be stripped of an absolute defense to the suit – the difference between winning the case without a trial and abiding the unknown outcome of such a proceeding. If this does not constitute clear legal prejudice to the defendant, it is hard to envision what would.

Id. (internal citation omitted); but see *id.* at 990 (Politz, J., dissenting); see also *Ikospentakis v. Thalassic S.S. Agency*, 915 F.2d 176, 178 (5th Cir. 1990) (discussing *Phillips*). This case presents us with the same situation – the potential that, absent a dismissal with prejudice, TWA will be stripped of its absolute

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[5] Like the defendants in *McCants* and *Phillips*, TWA can use the statute of limitations to bar Hillary's claim in the state where the Rule 41(a)(2) motion was filed, but would not be able to do so in a second forum– here, Missouri, where the applicable statute is five years. Mo. Ann. Stat. §516.120 (Vernon 1991).

defense of the statute of limitations.[6] Therefore, we find no abuse of discretion in the district court's denial of Hillary's motion for voluntary dismissal without prejudice, under the rule set out in *Phillips*.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

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[6] The district court order contains language that seems to limit, or modify, the dismissal, so that it applies only to that court:

> This ruling does not reach the merits of Plaintiff's claim, and this court expresses no opinion as to whether this matter can now be litigated in some other forum that does not apply the Louisiana prescriptive period. Accordingly,
>
> IT IS ORDERED that Defendant's Motion for Summary Judgment is hereby GRANTED, dismissing Plaintiff's claim with prejudice in this court.

(Emphasis added.)

As noted, Hillary states that she filed suit in Missouri when she filed her Rule 41(a)(2) motion in Louisiana. Of course, the district court in Missouri, not this court, controls that suit.

MINUTE ENTRY
McNAMARA, J.

NOVEMBER 27, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROSETTA HILLERY	*	CIVIL ACTION
VERSUS	*	NO. 91-1312
TRANSWORLD AIRLINES, INC.	*	SECTION "D" (6)

Before the court are (1) Defendant's Motion for Summary Judgment and (2) Plaintiff's Motion to Dismiss Without Prejudice. Each motion is opposed by the non-moving party. Both are before the court on briefs, without oral argument.

Plaintiff, who claims to be a Louisiana domicilary, alleges that on March 16, 1987, she suffered an injury in St. Louis, Missouri, when an item of carry-on baggage, which was being removed from an overhead storage bin by Defendant's employee on Defendant's airplane, struck her on the head.

After a series of unsatisfactory experiences with attorneys in both Missouri and Louisiana, Plaintiff, through counsel, filed a Petition for Damages in this court on April 4, 1991, asserting that "The law of the state of Missouri is applicable to all aspects of this claim, as the State of Missouri was the situs of the accident." Petition for Damages, p. 1.

Defendant moves for summary judgment on the grounds that "[t]action is...time-barred due to the Louisiana prescription period of one year. Although plaintiff asserts that the law of Missouri governs all aspects of the claim, this is irrelevant given the long-standing maxim of the Fifth Circuit that statutes of limitation or prescriptive statutes are procedural in nature and are controlled by the law of the forum." Memorandum in Support of

Motion for Summary Judgment, p.1 (citing Rohde v. Southeastern Drilling Co., 667 F.2d1215, 1219 (5th Cir. 1982)).

Plaintiff, in her brief on the subject motions, is "hardpressed to deny the correctness of defendant's position" on the prescription issue. Memorandum in Opposition to Defendant's Motion for Summary Judgment, and in the Alternative, Motion for Voluntary Dismissal Without Prejudice, p.3. Plaintiff prays, however, that this court grant a voluntary dismissal without prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure so that she may pursue her suit in Missouri, where the statute of limitations is five years and the suit would not be time-barred.

Defendant is correct that the Louisiana prescriptive period is applicable to actions litigated in this court under circumstances such as those in the instant case. See Rohde, supra. On that narrow issue, the only one before this court, defendant is entitled to summary judgment as a matter of law. See Fed. R. Civ. P. 56.

This ruling does not reach the merits of Plaintiff's claim, and this court expresses no opinion as to whether this matter can now be litigated in some other forum that does not apply the Louisiana prescriptive period. Accordingly.

IT IS ORDERED that Defendant's Motion for Summary Judgment is hereby GRANTED, dismissing Plaintiff's claim with prejudice in this court. Plaintiff's Motion for Voluntary Dismissal Without Prejudice is hereby DENIED (see Phillips v. Illinois Cent. Gulf R.R., 874 F.2d 984 (5th Cir. 1989)).

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NO. 93-1593

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OCTOBER TERM, 1993

ROSETTA HILLARY,

Petitioner,

versus

TRANS WORLD AIRLINES, INC.

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether this Honorable Supreme Court should grant a Writ of Certiorari to review an issue which is resolving itself within the circuit courts.

PARTIES TO THIS PROCEEDING

Rosetta Hillary

Trans World Airlines[1]

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[1] Trans World Airlines has no parent company and no subsidiaries which are not wholly owned.

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9 Wright and Miller, Fed. Practice and Procedure; Civil §§ 2362, 2364 at 164, 165 (1971). 3,4

STATUTES INVOLVED

La. Civ. Code Ann. art. 3492 (West 1993):

> Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained. It does not run against minors or interdicts in actions involving permanent disability and brought pursuant to the Louisiana Products Liability Act or state law governing product liability actions in effect at the time of the injury or damage.

Fed. R. Civ. P. 41(a):

> (1) **By Plaintiff; by Stipulation.** Subject to the provisions of Rule 23(e); of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.
>
> (2) **By Order of Court.** Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's

instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

NO. 93-1593

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ROSETTA HILLARY,

Petitioner,

versus

TRANS WORLD AIRLINES, INC.

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The facts in this case are not in dispute. Plaintiff alleges that on 16 March 1987, she was a passenger on TWA flights from Los Angeles to New Orleans. As she prepared to deplane in St. Louis to board a connecting flight, an employee of TWA allegedly injured her. In April 1991, over four years after her alleged accident, Plaintiff filed suit against TWA in the United States District Court

for the Eastern District of Louisiana. TWA answered and immediately filed a Motion for Summary Judgment asserting that the applicable one-year statute of limitations set forth in La. Civ. Code Ann. art. 3492 (West 1993) had expired. Plaintiff, "hard pressed to deny the correctness of TWA's position," moved for a voluntary dismissal without prejudice pursuant to Fed. R. Civ. P. 41(a) so that she could pursue the matter against TWA in Missouri.[2] The district court, recognizing that TWA's Motion for Summary Judgment was valid, granted TWA's motion and, following the clear mandate of the United States Court of Appeals for the Fifth Circuit, dismissed Hillary's case with prejudice.

Hillary timely perfected an appeal to the Fifth Circuit which summarily affirmed the district court's decision in a *per curiam* opinion. This Writ application ensued.

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[2]Missouri's statute of limitations is five years.

REASON WHY WRIT SHOULD BE DENIED

No Conflict Between the Circuit Courts Exists Such That A Review By This Court is Warranted.

Hillary submits that this Honorable Court should grant a Writ of Certiorari pursuant to Rule 10.1(a) of the Supreme Court Rules to address a perceived conflict between the Fifth and Eleventh Circuit Courts of Appeals. A review of Fed. R. Civ. P. 41(a) and the evolving jurisprudence interpreting the relevant provisions of that statute, however, confirms that any perceived conflict which may exist is being properly resolved in the Circuit Courts. As such, it is premature for this Honorable Court to consider the issue.

At issue is whether it is an abuse of discretion for a federal court to deny plaintiff a dismissal without prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure where the defendant has filed a Motion for Summary Judgment based on an applicable statute of limitations and a dismissal without prejudice would deny defendant this absolute defense.

Fed. R. Civ. P. 41(a)(2) provides in pertinent part:

> An action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.

When considering a dismissal without prejudice, the court should keep in mind the interest of the defendant, for it is his position which should be protected. 9 Wright and

Miller, Fed. Practice and Procedure; Civil §§ 2362, 2364 at 164, 165 (1971), *citing* LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 604 (5th Cir.1967).

In the proceedings below, the district court and the Court of Appeals based its decision on Phillips v. Illinois Central Gulf Railroad, 874 F.2d 984 (5th Cir.1989), which held that the loss of a valid statute of limitations defense constitutes the type of clear legal prejudice that precludes granting a motion to dismiss without prejudice. *Id.* at 987. Hillary, relying on McCants v. Ford Motor Co., 781 F.2d 855 (11th Cir. 1986), argues that this court should grant writs because Phillips and McCants are at odds. Hillary then states that "virtually every court that has addressed this issue has decided in favor of the party moving for dismissal without prejudice" (petitioner's writ application p.3). That statement is inaccurate.

The weight of lower court authority suggests that the Phillips court reached the correct result.[3] Moreover, at least one other circuit has specifically rejected McCants and adopted the Phillips rationale. In Metropolitan Federal Bank v. W.R. Grace & Co., 999 F.2d 1257 (8th Cir. 1993) the Eighth Circuit squarely confronted Phillips and McCants and held:

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[3]*See* Love v. Silas Mason, 66 F.Supp. 753 (W.D. La. 1946); Bamdad Mechanic Company Ltd. v. United Technologies Corp., 109 F.R.D. 128 (D. Del. 1985); Placid Oil Company v. Ashland Oil, Inc., 792 F.2d 1127 (Em. App. 1986); Patterson v. Alaska Airlines, Inc., 756 F. Supp. 476 (W.D. Wash. 1990).

> To the extent the Eleventh Circuit would hold that the loss to the defendant of a proven, valid statute of limitations defense does not constitute legal prejudice that would bar voluntary dismissal, we respectfully disagree. We would consider it an abuse of discretion for a district court to find no legal prejudice, and thus to grant voluntary dismissal, where the non-moving party has demonstrated a valid statute of limitations defense to the claims sought to be dismissed.

Metropolitan Federal Bank v. W.R. Grace & Co., 999 F.2d at 1263.

Even within the Eleventh Circuit, the McCants holding is being questioned. In Gulf States Steel v. Lipton, 765 F. Supp. 696 (Northern District Ala. 1990), *aff'd*, 934 F.2d 1265 (11th Cir.1991) the defendants filed a Motion for Summary Judgment based in part on the tolling of Alabama's statute of limitations. Thereafter, plaintiffs filed a motion pursuant to Rule 41(a) for voluntary dismissal without prejudice so that they could refile their suit in a jurisdiction with a longer statute of limitations. The district court first acknowledged that the issue was squarely confronted by the Eleventh Circuit in McCants, but then noted that the Fifth Circuit "expressly reject[ed] McCants seemingly broad holding" in Phillips. Gulf States 765 F. Supp. at 699. The Gulf States court thereafter resisted extending McCants by factually distinguishing the action before it from McCants. Plaintiff's Motion for Voluntary Dismissal was denied.

CONCLUSION

The perceived conflict which plaintiff highlights is resolving itself within the lower courts. The bright line rule set forth in McCants which Hillary wishes this Court to adopt has been rejected expressly by the Fifth and Eighth Circuits. Moreover, the Phillips rationale which petitioner wishes to overturn has been adopted by the Fifth and Eight Circuits and embraced by one of the district courts within the Eleventh Circuit. As such, this Honorable Court should deny petitioner's Writ application and permit this perceived conflict to meet its evolutionary demise within the lower courts.

Respectfully Submitted,

BY: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served on counsel for all parties by depositing same in the United States Mail, postage prepaid, this 6 day of May, 1994.

HOWARD DAIGLE, JR.